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IN THE

Supreme Court of the United States

October Term, 1991

ALPHA LYRACOM SPACE COMMUNICATIONS, INC., a Delaware corporation, and REYNOLD V. ANSELMO, an individual, doing business as PAN AMERICAN SATELLITE, a sole proprietorship,

Petitioners,

v.

COMMUNICATIONS SATELLITE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners above-named ("PAS"), pursuant to United States Supreme Court Rule 15.6, hereby file this reply brief addressed to arguments first raised in the brief in opposition by the respondent, Communications Satellite Corporation ("Comsat").

ARGUMENT

I. THE BRIEF IN OPPOSITION SHOWS THE IMPORTANCE OF THE QUESTION PRESENTED FOR REVIEW

Comsat's brief in opposition itself demonstrates the importance of the question presented by the petition and the need to grant review.

First, the brief in opposition is replete with references to the importance of space satellite telecommunications, the interest of the United States in promoting and developing this field of technology, and the concern of both the Executive and Legislative Branches of the government that competition be maintained in satellites. Brief for the Respondent in Opposition ("brief in opposition"), pp. 4, 5, 6, 9, 10-12, 22-25. Repeatedly, Comsat stresses that participation in the International Telecommunications Satellite Organization ("Intelsat") is an important aspect of United States foreign policy, in which Comsat claims to exercise "an important . . . function," although, as will be shown, not nearly to the extent claimed. Brief in opposition, *e.g.*, pp. 9-10.

Second, Comsat does not disagree that the question presented has not arisen before, and may not arise again, unless this Court grants review. Brief in opposition, p. 17. Accordingly, the decision of the Second Circuit will limit Comsat's antitrust accountability for the foreseeable future in this important area of technology in the absence of intervention by this Court.

Finally, and most important, Comsat makes no secret of its view that the Second Circuit's decision provides Comsat with a license to perpetuate monopoly and foreclose competition by whatever means Comsat is able to devise and implement through its role as a participant in Intelsat. Comsat readily acknowledges that the immunity granted by the Second Circuit insulates Comsat from antitrust liability for any action taken by Comsat within the confines of Intelsat, regardless of how much damage Comsat is knowingly able to wreak on competition. Comsat unabashedly embraces the pronouncement of the Second Circuit, which frames the basic issue raised by the petition:

> Having created Comsat to wield monopoly power, along with the other participants in a global satellite system, Congress did not expect that corporation to face antitrust liability in deciding, as a member of Intelsat, whether and to what extent to permit competition.

(Appendix to Petition for Writ of Certiorari ("App.") A-12).

Thus, if this Court does not grant review, Comsat will proceed with the understanding that it may freely use its position in Intelsat to effectuate and perpetuate its monopoly as a purveyor of space satellite services outside of Intelsat. A decision authorizing a monopolist to entrench its monopoly in a vital area of new technology raises an important question that this Court ought to consider.

II. COMSAT REPEATEDLY MISCHARACTERIZES PAS' COMPLAINT AND COMSAT'S OWN ROLE, IN A FRUITLESS EFFORT TO PROVE THAT THE IMMUNITY GRANTED BY THE SECOND CIRCUIT IS NARROW AND CAREFULLY CRAFTED

Comsat's opposition to the petition of PAS rests on three fundamentally erroneous propositions. First, Comsat seeks to portray its actions as an Intelsat signatory as being largely, if not always, subject to instructions and directions from one or more branches or departments of the United States Government. Second, Comsat describes the complaint in this case as challenging the conduct of Comsat in carrying out such Governmental instructions and directions. Third, Comsat contends that the immunity granted by the Second Circuit has been carefully crafted and narrowly limited so as to protect Comsat only in carrying out its quasi-governmental functions, which are the alleged focus of attack in the complaint.

All three propositions are demonstrably false, and it is important for this Court to understand their falsity in considering this petition.

In fact, Comsat is subject to directions and instructions from the United States Government only in very limited circumstances not here relevant. Intelsat has a tripartite structure, consisting of the Assembly of Parties, the Meeting of Signatories, and the Board of Governors. *See* Agreement Relating to the International Telecommunications Satellite Organization "Intelsat" done Aug. 20, 1971, entered into force Feb. 12, 1973, 23 U.S.T. 3813, T.I.A.S. No. 7532 (1971) ("Definitive Agreement") (App. D-111, 121) Comsat does not participate in the Assembly of Parties, where the United States is represented by a principal officer of the Department of State. *In the Matter of Comsat Study – Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 77 F.C.C.2d 564, 631, 747 (1980). As a party, the United States does not participate in the other two branches, the Meeting of Signatories and the Board of Governors, which consists of 29 signatories. *See* Definitive Agreement (App. D-111, 126, 130).

Although Comsat participates in the Meeting of Signatories, it does so almost entirely free of instructions from the United States Government, which has instructed Comsat no more than once or twice on matters before the Meeting of Signatories. Comsat and the other Intelsat signatories, a number of which are private companies like Comsat, deal with wholly commercial matters, without governmental direction, such as the operations and marketing of the Intelsat system. *See* First Amended Complaint (App. C-3, 4, 6, 14, 15, 17, 18). The instructional process is thus inapplicable to Comsat's actions at the Meeting of Signatories. To the extent Comsat has sought to imply otherwise in its brief in opposition, Comsat has misstated its role and the function of the instructional process of Intelsat.

The only significant involvement of Comsat in the instructional process arises in Comsat's participation in the Board of Governors of Intelsat. Here, Comsat receives instructions from the United States Government as to the Government's position on agenda items before the Board of Governors, if any such items are of interest to the Government and if the Government has a position it wishes Comsat to present.

Large areas of activity therefore exist where Comsat operates as an Intelsat signatory entirely free of Government instructions and direction. Comsat's brief in opposition obscures this important fact.

Second, the complaint of PAS does not in any way challenge any of Comsat's actions in those extremely limited areas where Comsat has received Government instructions. PAS alleges no violation of law by Comsat in following or implementing any instruction of the United States Government. Rather, the complaint limits its claims to conduct in which Comsat has engaged through its own independent and discretionary functions, outside the bounds of Government direction.

In the brief in opposition, Comsat counters by arguing, first, that Comsat is always acting subject to Government instructions, and, second, that the language of the complaint does not limit itself to non-instructional situations. The first argument is factually false, as shown in the preceding discussion. The second both misreads the complaint and misapplies controlling law.

The allegations of the complaint do not in any way challenge or call in question any Government instruction to Comsat or any action of Comsat taken under any Government instruction. To the contrary, the complaint alleges that Comsat has acted contrary to and in derogation of United States Government policy to promote competition in space satellites through the development of alternative systems, such as PAS. *See* First Amended Complaint (App. C-1, 17-27). Moreover, the Communications Satellite Act itself expressly recognizes that Comsat may so act, and provides for remedies, including, implicitly, private antitrust actions like this. Section 403 of the Act permits suit by the Government against Comsat for engaging in "any action, practices, or policies inconsistent with the policy and purposes declared in" section 101 of the Act, which provides, *inter alia*, that the conduct of Comsat "shall be consistent with the Federal antitrust laws." Section 403 goes on to specify that the Government enforcement it authorizes shall not relieve Comsat "of any punishment, liability, or sanction

which may be imposed otherwise . . . " 47 U.S.C. Sec. 743. The complaint of PAS thus is fully in line with the Act itself.

In addition, the law requires that the complaint be read, when opposed by a motion to dismiss, in the light most favorable to PAS. The lower courts were required to "follow, of course, the accepted rule that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "This rule applies with no less force to a Sherman Act claim . . . " *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 (2d Cir. 1977). "[D]ismissals on the pleadings are especially disfavored in antitrust cases." *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 746 (1976). Obviously, here, given the choice between reading the complaint as challenging immune conduct of Comsat acting subject to Government instructions, or non-immune non-instructed conduct, the foregoing authorities compel the latter reading, even were there any doubt as to the meaning of the complaint.

Thus, not only does Comsat engage in significant conduct at Intelsat free of Government instruction, but the complaint attacks that very conduct as to which the Government does not instruct Comsat.

The immunity conferred by the Second Circuit, however, does not observe this line of demarcation. Rather, the Second Circuit immunizes all conduct of Comsat at Intelsat, whether subject to Government instruction or not. The Second Circuit sweeps within its grant of immunity everything Comsat may do at Intelsat, even if not subject to Government instruction, including discretionary and unsupervised actions in the Meeting of Signatories, which PAS has challenged in its complaint. This is not a narrow and carefully crafted grant of immunity, as Comsat would have this Court believe. It is crudely drawn, unnecessarily broad, and inclusive of much conduct that is properly the concern of the antitrust laws. As this Court has oft cautioned, immunity from the antitrust laws is disfavored, and

should be strictly construed to be no broader than necessary. *Nat'l Gerimedical Hosp. v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981).

Notwithstanding Comsat's efforts to obscure what has happened, those principles have been trampled on here; and this Court should grant review to ensure their preservation.

CONCLUSION

For the reasons stated in its petition and this reply, PAS respectfully asks this Court to grant certiorari to review the decision below.

Dated this 3rd day of February, 1992.

Respectfully submitted,

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